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Delay, inadequacies and abuse of discretion are familiar problems to the immigration attorney. This article delineates four particular actions which can be utilized by the practitioner in defense of an alien: mandamus, preliminary injunction and temporary restraining order, a Bivens tort action against the individual Service agents, and recovery of attorneys' fees. The authors conclude these are unusual remedies and should be sought with a great deal of care. They are, however, viable causes of action to redress wrongs suffered by an alien at the hands of the Immigration and Naturalization Service.

Delay to the point of affirmative misconduct, delay to the point of denial of a petition, outrageous conduct, conduct which violates constitutional rights, arbitrary and capricious conduct, and abuse of administrative discretion are all problems with which the immigration and naturalization practitioner is familiar. An attorney is frequently forced to take action in response to Immigration and Naturalization Service (Service) inadequacies and misconduct, whether intentional or unintentional. One form of response is to file a complaint with the District Director of the Service where there has been any violation or misconduct by a particular Serv-

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ice officer.[1] Another may be to request the assistance of elected officials in helping to move cases through the Service. In many instances, however, the only available relief must be sought through the judicial system. It is the purpose of this article to address some methods of judicial relief available to the clients of immigration and naturalization practitioners.

In general, the district court has jurisdiction to review decisions of the Service which determine an alien's status.[2] However, judicial review is only permitted where there has been final agency action.[3] In the context of immigration and naturalization law, it may be said that no action of the Service is final until a final order of deportation or exclusion is issued. It is clear, however, that it is not necessary for an alien to wait for that particular final order to obtain judicial review.[4]

The primary vehicle for judicial review is the declaratory judgment.[5] When deciding whether declaratory relief is appropriate,

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1. IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEP'T OF JUSTICE, OPERATIONS INSTRUCTIONS, REGULATIONS AND INTERPRETATIONS § 287.10 (1980).

2. Nippon Express U.S.A., Inc. v. Esperdy, 261 F. Supp. 561 (S.D.N.Y. 1966). Following the enactment of Immigration and Nationality Act § 106(a), 8 U.S.C. 1105a(a) (1976), there was some disagreement among various circuits as to the proper forum in which to challenge an order of the Service that did not constitute a final order of deportation. Nippon Express, U.S.A., Inc. v. Esperdy, 261 F. Supp. at 561. The Seventh Circuit held that the district court had no jurisdiction, while the Third and Fifth Circuits held that it did. *Id.* at 563. In resolving the question, the Supreme Court held: "[I]n situations to which the provisions of § 106(a) [8 U.S.C. § 1105a(a)] are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." Cheng Fan Kwok v. INS, 392 U.S. 206, 210 (1968) (denial of a stay of deportation reviewable by the district court when the denial had not been made during the course of deportation hearing).

Since *Cheng Fan Kwok*, several district courts have found jurisdiction based on Immigration and Nationality Act § 279, 8 U.S.C. § 1329 (1976) where 8 U.S.C. § 1105a(a) (1976), does not apply. *See, e.g.*, Nasan v. INS, 449 F. Supp. 244 (N.D. Ill. 1978); Parco v. Morris, 426 F. Supp. 976, 978 n.4 (E.D. Pa. 1977); Manarolakis v. Coomey, 416 F. Supp. 532, 534 n.1 (D. Mass. 1976); Ming v. Marks, 367 F. Supp. 673 (S.D.N.Y. 1973); Buckley v. Gibney, 332 F. Supp. 790 (S.D.N.Y. 1971).

3. Administrative Procedure Act, 5 U.S.C. § 704 (1976).

4. Navarro v. District Director of INS, 574 F.2d 379 (7th Cir.), *cert. denied*, 439 U.S. 861 (1978) (alien brought action seeking declaration that she had a valid, effective and unrevoked third preference status; court held that Declaratory Judgment Act gave alien a basis for seeking federal court review, and that she did not need to await a deportation order).

5. The statutory basis for this action is the Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. IV 1980); the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976); and that section of the Immigration and Nationality Act which confers review powers on the United States district court. Immigration and Nationality Act § 279, 8 U.S.C. § 1329 (1976).

Until 1961, the major statutory provisions for judicial review of immigration and naturalization decisions were contained in the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 230, which confers upon the district court jurisdiction over all causes of action arising under the provisions of title 8 of the United States

it is necessary to establish that the challenged ruling constitutes a final agency action other than final orders of deportation or exclusion.[6] Many types of Service decisions have been held to be properly reviewable as final actions, including denial of voluntary departure,[7] denial of suspension of deportation,[8] denial of adjustment of status,[9] denial or revocation of relative or preference petitions,[10] change of nonimmigrant status,[11] and denial of visa petitions.[12] Indeed, any agency action for which there is no further administrative review or relief is ripe for a declaratory judgment action.[13]

Code. *See* Immigration and Nationality Act § 279, 8 U.S.C. § 1329 (1976). After 1961, however, section 106(a) of the Act conferred exclusive jurisdiction upon the courts of appeals to review final orders of deportation and exclusion. Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105a(a) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620.

The procedure for filing an action for declaratory judgment is covered by rule 57 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 57. Generally, a summons and complaint must be filed in the district where venue is proper (*see* 28 U.S.C. § 1391(e) (1976), *infra* note 36 and accompanying text) and the complaint must allege that the action of the Service was arbitrary, capricious, exceeded authority, or was an abuse of discretion. *See* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 8.11 (rev. ed. 1980).

6. Under the current statutory scheme, the proper method for seeking review of a deportation order is through a petition for review to the court of appeals, while an exclusion order is reviewed by a writ of habeas corpus to that same court. This article will deal only with actions arising out of the Immigration and Nationality Act which are properly heard in the district court.

It is important to note that while a petition to review a deportation order automatically triggers a stay of that order, this is not so in an action for declaratory judgment in cases involving other final actions of the Service. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 8.9(c) (rev. ed. 1980). Thus, for example, if a request for voluntary departure is denied, the Service may issue an order to show cause while the case is in the district court on a declaratory judgment action. In this type of situation it is necessary to file a motion for a temporary restraining order simultaneously with the complaint, asking that the Service be restrained from taking any further steps to enforce its decision. For the requirements of a temporary restraining order, see *infra* notes 40-61 and accompanying text.

7. Ullah v. Hoy, 278 F.2d 194 (9th Cir. 1960); Hegerich v. Del Guercio, 255 F.2d 701 (9th Cir. 1958).

8. McGrath v. Kristensen, 340 U.S. 162 (1950).

9. Marino v. INS, 537 F.2d 686 (2d Cir. 1976); Nasan v. INS, 449 F. Supp. 244 (N.D. Ill. 1978).

10. Roumeliotis v. INS, 304 F.2d 453 (7th Cir.), *cert. denied*, 371 U.S. 921 (1962); Dong Yup Lee v. INS, 407 F.2d 1110 (9th Cir. 1969).

11. Vosough-Kia v. District Director of INS, 441 F.2d 545 (9th Cir. 1971).

12. Wong v. Hoy, 173 F. Supp. 855 (S.D. Cal. 1959) (review of denial proper if clearly wrong).

13. Some courts, however, have held that they are without jurisdiction to review a decision of a District Director denying a petition for political asylum.

While the declaratory judgment is a common vehicle for seeking judicial review in the context of immigration and naturalization law, it has two important limitations. First, the plaintiff must have a "final agency action" which can be reviewed by the court. Since it is often the long delay in adjudication by the Service that the plaintiff is seeking to remedy, this requirement may in actuality render the declaratory judgment useless. An applicant or petitioner may wish to pursue a writ of mandamus,[14] an injunction, or a temporary restraining order[15] to remedy delay situations. Second, the declaratory judgment provides little or no opportunity to review the actions of individual Service agents.

The remainder of this article will focus on federal court actions in immigration and naturalization cases other than the petition for review, the petition for habeas corpus, and the action for a declaratory judgment. This article will explore the uses of and procedures for writ of mandamus, temporary restraining order, and tort actions.[16] In addition, it will discuss the possibility of recovering attorneys' fees in these cases. It is hoped that this somewhat brief description of these techniques will assist immigration and naturalization attorneys in furthering the interests of their clients.

Writ of Mandamus

The immigration and naturalization attorney is often faced with considerable delay in the adjudication process. Applications or petitions which should take a few minutes or days to decide are often held by the Service for months or even years.[17] As long as there is no action taken, the applicant or petitioner may be helpless to appeal to the next level of decision-makers within the Service (the Regional Commissioner or Board of Immigration Appeals) or to the judicial system. Many aliens are caught in a "twilight zone" not knowing how their status will be affected when a

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Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978); Chen Chaun-Fa v. Kiley, 459 F. Supp. 762 (S.D.N.Y. 1978).

14. *See infra* notes 17-39 and accompanying text.

15. *See infra* notes 40-61 and accompanying text.

16. Although it has rarely been used in immigration cases, an alien may have a tort action against individual Service agents if there was an unreasonable search and seizure, a warrantless arrest, or unjust discrimination. *See infra* notes 62-88 and accompanying text.

17. In some Service offices the delay problem has been alleviated by the inception of "up front adjudication" programs. Where these programs exist, certain types of petitions and applications are adjudicated at the time they are filed. "up front adjudication" is still in the experimental stage, however, and has not been instituted in the majority of Service offices. Memorandum Re: One Step Processing by E.B. Duarte, Jr., Director of the Outreach Program, Central Office, INS (May 21, 1981).

decision is finally made, and unable to make any concrete future plans. In many cases an alien will be anxious to clarify his status by pursuing his legal right to appeal. This can only be done once the Service has made or has been forced to make a decision.

Although some delay is certainly to be expected in a bureaucracy as large as the Service, limits must be imposed in order to protect both aliens and citizens. When the delay is unreasonable, or when it appears that action is being deliberately and unlawfully withheld, the practitioner may wish to consider seeking a writ of mandamus in the United States district court.

Mandamus relief is statutory in nature. The first of these statutes specifically confers jurisdiction in the federal district court "of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[18] The second basis of mandamus is the statute which confers general federal question jurisdiction in all district courts.[19] Finally, the Administrative Procedure Act states in part: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed. . . ."[20] Section 279 of the Immigration and Nationality Act, which confers jurisdiction on the district court over "all causes, civil and criminal, arising under any of the provisions of [subchapter II],"[21] could be an alternate basis of jurisdiction for a mandamus action.

In issuing a writ of mandamus, the court's authority is generally limited to ordering that some action be taken, and that it be reasonable action.[22] The court cannot and will not usurp the deci-

18. 28 U.S.C. § 1361 (1976).
19. 28 U.S.C. § 1331 (Supp. IV 1980).
20. 5 U.S.C. § 706 (1976).
21. Immigration and Nationality Act § 279, 8 U.S.C. § 1329 (1976). Section 1361 establishes the burden of proof in all immigration and nationality cases. 8 U.S.C. § 1361 (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620.
22. *See, e.g.*, Wilbur v. United States, 281 U.S. 206 (1930) (mandamus employed to compel action in judgment and discretion, but not the outcome); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971) (court refused to direct discretionary act of Department of Defense in storage of nerve gas); Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950) (capricious act or failure to act on part of Service grounds for mandamus); Lovallo v. Froehlke, 346 F. Supp. 1037 (W.D.N.Y.) (court will not

sion-making power of the executive branch by impelling a specific action where the officer or agent has discretion in how he acts.[23] Therefore, in determining whether to seek mandamus, the practitioner must consider the strategic advantages and disadvantages of forcing Service action when the specific outcome of such action is unknown.[24]

There may be circumstances, however, in which the court *will* order specific relief if there has been a violation of a statute by a government agent or agency. In *White v. Mathews*,[25] the plaintiffs brought a class action seeking mandamus relief in regard to their entitlement to disability insurance benefits under the Social Security Act.[26] The court found that the average delay of 211.8 days in determining eligibility for such benefits was unreasonable and was in fact a violation of the statute.[27] It was ordered that within a two-year period the delay be reduced to 120 days.[28] The court upheld the district court's order that payment of benefits be made to prospective "claimants who endure delays longer than the schedule allows."[29] Thus, in this particular mandamus action, the court was willing to go beyond merely ordering the agency to act, and in fact provided some remedial relief for the individuals harmed by the failure to act.[30]

It is not difficult to conceive of situations in which such an order would be appropriate in immigration and naturalization cases. Where the unreasonable delay that gave rise to the mandamus action amounts to a violation of a statute, some courts may be

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interfere with "the day to day operations of the Armed Forces"), *aff'd*, 468 F.2d 340 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973).

23. Martinez v. Bell, 468 F. Supp. 719 (S.D.N.Y. 1979) (decision to issue visa or priority dates is discretionary and not within scope of mandamus jurisdiction); *see* Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950).

24. While mandamus might be appropriate where the Service is long overdue in deciding a third or sixth preference case, the need for such action may be obviated if a relative of the beneficiary becomes a citizen. This would only be the case if the citizenship of the close relative afforded the alien the status of "immediate relative," entitling him to an immediate visa. If, however, the citizenship were of a brother or sister (thus affording fifth preference status to the alien), there might not be a visa number immediately available. In this latter case, the decision whether to pursue the third or sixth preference petition or the fifth preference petition will depend upon the availability of visa numbers.

25. 559 F.2d 852 (2d Cir.), *cert. denied*, 435 U.S. 908 (1977).

26. 42 U.S.C. § 405(g) (Supp. IV 1980); 42 U.S.C. § 405(h) (1976).

27. 559 F.2d at 855.

28. *Id.*

29. *Id.* at 860.

30. It should be noted that in this case the interim benefits were recoverable if the final decision was adverse to the claimant. That is, if an individual received interim benefits after a 120-day delay pursuant to the court order, and if the Social Security Administration ultimately decided that the individual was not entitled to disability benefits, the Administration was entitled to full recoupment of the benefits paid. White v. Mathews, 559 F.2d 852 (2d Cir.), *cert. denied*, 435 U.S. 908 (1977).

willing to order interim or ancillary relief.[31] The immigration and naturalization attorney should be alert to cases in which it might be appropriate to request such relief in a writ of mandamus.

In general, however, the court will limit itself to impelling a government agent or agency to act, and it is with this in mind that the practitioner should decide whether to pursue mandamus. Under the statutory scheme discussed above, in order for mandamus to be appropriate, two questions must be answered in the affirmative:

1. Is there a duty owed to the plaintiff by the defendant;[32] and,
2. Has action been unlawfully withheld or unreasonably delayed?[33]

If both of these elements are present, the time is ripe for a mandamus action. It is advisable, in the interest of avoiding unnecessary litigation, to notify the Service at this point of one's intention to file a mandamus action on a specific future date if a decision is not rendered. This final "warning" will give the Service one last

31. Although it did not involve an action for mandamus, Miranda v. INS, 673 F.2d 1105 (9th Cir. 1982) (per curiam), was a delay case where the court was willing to order some unusual relief. In *Miranda*, there was an unexplained eighteen-month delay by the Service in acting upon an immediate relative petition filed by the alien's wife. During that period the marriage dissolved and the petition was withdrawn. The alien was denied adjustment of status, was denied voluntary departure, and was ordered deported. On the petition for review to the Ninth Circuit Court of Appeals and again on remand, the court found that the delay was affirmative misconduct on the part of the Service and ordered that the application for permanent residency be considered under the circumstances that existed at the time the Service should have acted (*e.g.*, when the petitioner and beneficiary were still married). This type of backdating might also be available in a mandamus action, if an alien shows that his circumstances have changed in such a way that he has been injured by the delay of the Service.

A writ of mandamus may be used to force specific action where a capricious act (or failure to act) or a capricious policy of the government exists. In Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950), the alien had been denied discretionary relief by the Service because it was Service policy not to grant such relief to individuals who were in the United States for reasons connected with the war. The court found that there was no justification for the Service policy and that the policy was in fact capricious. The court held it would compel correction of the agency's abuse of discretion when an official is capricious in his failure to act, or fails to act pursuant to a capricious law or policy.

32. 28 U.S.C. § 1361 (1976). Generally, the duty to act must be clearly stated in a statute or regulation. *See, e.g.*, Leonard v. Mitchell, 473 F.2d 709 (2d Cir.), *cert. denied*, 412 U.S. 949 (1973); Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970). However, the court may interpret a statute or regulation to find a "clear duty." *See* Haneky v. Secretary of Health, Education and Welfare, 535 F.2d 1291 (D.C. Cir. 1976); Lyons v. Weinberger, 376 F. Supp. 248 (S.D.N.Y. 1974).

33. Administrative Procedure Act, 5 U.S.C. § 706 (1976).

opportunity to act on a petition or application within the administrative context. If no action is forthcoming, the necessary pleadings requesting a writ of mandamus should then be filed.

Mandamus Procedure

The complaint in an action for a writ of mandamus should be filed in the United States district court which has jurisdiction and venue, and should contain the following:

1. Jurisdiction:
   Jurisdiction is based upon 28 U.S.C. § 1361, § 1331, and 5 U.S.C. § 706.[34] In addition, allegations should state the provisions of the Immigration and Nationality Act which require the Service to act.
2. Venue:
   Venue is founded on 28 U.S.C. § 1391,[35] which states that venue is proper when any of the following conditions exist:
   (a) The court is in the district where the defendant resides;
   (b) The cause of action arose within the court's jurisdiction;
   (c) The plaintiff resides within the district if there is no real property involved;
   (d) There is real property located within the district;
   (e) In a civil action where officers or employees of any federal agency or of the United States, acting in their official capacity, are defendants, any one of the above four venue sites is appropriate.
3. Description of the plaintiff.
4. Description of the defendant, for example, the Service is an agency of the Department of Justice.
5. Short, concise statement of the facts upon which the complaint is based, showing especially:
   (a) Defendant had a ministerial duty to perform;
   (b) Plaintiff had a right to expect defendant to act;
   (c) There is no other remedy capable of affording relief;
   (d) The plaintiff has been prejudiced and harmed by defendant's delay;
   (e) The plaintiff comes before the court with clean hands, and has sought mandamus with reasonable promptness.[36]
6. Standing:
   The plaintiff must be the aggrieved or affected party.[37]

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34. *See supra* notes 18-20.
35. 28 U.S.C. § 1391 (1976).
36. Brewster v. Secretary of the Army, 489 F. Supp. 85 (E.D.N.Y. 1980).
37. Cornejo v. Landon, 524 F. Supp. 118 (N.D. Ill. 1981).

7. Relief requested:
   (a) An order requiring the Service to act;
   (b) Sanctions for failure to act, such as contempt of court and attorneys' fees, and retroactive rollback of the date of approval;
   (c) A shortened time for the government to answer;[38]
   (d) Injunctive or declaratory relief.

As in all litigation, it is advisable to check with the court clerk to ascertain local rules and filing requirements.

PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS

Preliminary injunctions and temporary restraining orders are governed by rule 65 of the Federal Rules of Civil Procedure, which outlines in detail the requirements of these remedies.[39] Both the preliminary injunction and temporary restraining order are extraordinary remedies, which have the purpose of preserving the status quo until the merits of a case can be adjudicated.[40] The preliminary injunction is issued pursuant to notice and hearing.[41] The temporary restraining order may issue without notice where there is a showing by affidavit that immediate and irreparable injury will result if the order is not issued.[42] The party seeking either a preliminary injunction or temporary restraining order has the burden of establishing four factors: likely success on the merits at trial;[43] irreparable harm if the preliminary relief sought is not granted;[44] that the movant's substantial need for protection clearly outweighs any foreseeable harm to the defendant;[45] and

38. It can be argued that the sixty days normally permitted the government to answer a complaint is simply too long in this type of delay case.

39. FED. R. CIV. P. 65; *see* 1 J. MOORE, FEDERAL PRACTICE 562-73 (1982).

40. American Radio Ass'n v. Mobile Steamship Ass'n, Inc., 483 F.2d 1 (5th Cir. 1973); Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd in part, vacated in part on other grounds*, 645 F.2d 592 (8th Cir. 1981); Jews for Urban Justice v. Wilson, 311 F. Supp. 1158 (D.D.C. 1970).

Since both the preliminary injunction and the temporary restraining order are extraordinary and short-term remedies, it is usually advisable to combine such actions with another action such as declaratory judgment, petition for review, or writ of mandamus.

41. FED. R. CIV. P. 65(a)(1)-(2).

42. *Id.* at 65(b). The applicant's attorney must certify in writing any efforts made to give notice and explain why the order should issue without notice.

43. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

44. *Id.*

45. Salomon N. Am., Inc. v. AMF, Inc., 484 F. Supp. 846 (D. Mass. 1980) (alleged trademark violation claim would not support injunction as plaintiff failed to show

finally, that the public interest would not be harmed by the granting of preliminary relief.[46] Each of these factors must be present before the court will grant either a preliminary injunction or a temporary restraining order.

Generally, preliminary relief will fulfill its purpose of preserving the status quo "by prohibiting the defendant from taking [any] harmful action while a suit is being litigated."[47] Under some circumstances, however, the court will issue a mandatory preliminary injunction or temporary restraining order "requiring the defendant to take certain affirmative action pending resolution of the litigation."[48] It should be noted that this latter type of injunctive relief is rare. Courts have stated that "[m]andatory preliminary relief, which goes well beyond simply maintaining the status quo *pendente lite*, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party."[49] In immigration and naturalization practice, the prohibitory type of preliminary relief may be sought where the alien is threatened with impending deportation, while the mandatory type might be sought when an unreasonable delay in the adjudication of a petition or application is causing irreparable harm to an alien or citizen.

The practitioner should be aware that in some actions for preliminary injunction or temporary restraining order the Service may raise the defense of failure to exhaust administrative remedies. Under the doctrine of administrative exhaustion, "in the ordinary situations, [c]ourts will defer exercising their jurisdiction over actions until available administrative procedures have been exhausted."[50] It has been held, however, that the exhaustion requirement is eliminated where the four factors required for preliminary injunction or temporary restraining order have been established.[51] Moreover, in several cases the exhaustion require-

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its immediate harm outweighed harm to the defendant); Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978) (as injections of psychotropic drug had terminated, no harm to plaintiff necessitated injunctive relief).

46. *See* A.O. Smith Corp. v. FTC, 530 F.2d 515, 525 (3d Cir. 1976) (a question for appellate court in limited review of preliminary injunction orders is: "[W]here lies the public interest?"); Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973) (absence of harm to the public interest a factor to consider on granting injunctive relief); Pennsylvania *ex rel.* Creamer v. United States Dep't of Agriculture, 469 F.2d 1387 (3d Cir. 1972) (preliminary injunction denied where, due to state meat inspection program, potential detriment to the public interest appeared).

47. Monahan v. Nebraska, 491 F. Supp. at 1090.

48. *Id.*

49. Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976).

50. Schrank v. Bliss, 412 F. Supp. 28, 35 n.2 (D. Fla. 1976).

51. Montilla v. Laird, 336 F. Supp. 1063 (D. Puerto Rico 1971).

ment has been waived in the face of excessive administrative delays.[52]

The preliminary injunction and temporary restraining order are appropriate remedies in immigration and naturalization cases where an alien or citizen is in danger of suffering irreparable harm as a result of the action or inaction of the Service. If this one critical factor can be established, it is likely that the remaining three factors discussed above can also be proven. An alien who is about to be deported and who has new evidence which should be considered, a United States citizen whose relative petition has not been acted upon in a timely manner and who is consequently separated from a loved one, an alien who has become destitute because his change of status has not been adjudicated and he therefore cannot accept employment—all of these situations present cases in which a preliminary injunction or temporary restraining order is appropriate.

Procedure for Preliminary Injunction and Temporary Restraining Order

The general procedure for seeking a preliminary injunction or temporary restraining order is included in rule 65. The rule should be read carefully. Additionally, a few specific points should be made for the practitioner who has never filed under rule 65:

1. A major difference between the preliminary injunction and the temporary restraining order is that notice is required for the former but not the latter.[53] The sufficiency of notice to an adverse party prior to the issuance of a preliminary injunction is a matter for the trial court's discretion.[54] It is clear that the service of a summons and complaint on the adverse party is adequate notice.[55] It has also been held, however, that service is not necessarily required if the adverse party has actual no-

52. Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), *vacated and remanded*, 457 U.S. 390 (1981) (issue of injunction held moot because the school had by then paid); Pollgreen v. Morris, 496 F. Supp. 1042 (D. Fla. 1980). It can also be argued that where the claimed harm is caused by administrative delay, any exhaustion requirement would exacerbate the harm.

53. FED. R. CIV. P. 65(b) sets forth the circumstances under which notice is not required with a temporary restraining order. *See supra* note 43.

54. Corrigan Dispatch Co. v. Casa Guzman, S.A., 569 F.2d 300 (5th Cir. 1978).

55. FRA S.P.A. v. Surg-O-Flex of America, Inc., 415 F. Supp. 418 (S.D.N.Y. 1975).

tice.[56] In a temporary restraining order action, informal notice or affidavits explaining why notice was not given are sufficient.[57]

2. In the pleadings for preliminary relief, it is important to allege the four factors discussed earlier.[58] That is, the complaint should state:
   (a) That the plaintiff is likely to succeed on the merits of his case at trial;
   (b) That the plaintiff will suffer immediate and irreparable harm if the relief is not granted;
   (c) That any harm that may be done to defendant by granting relief will be outweighed by the harm to plaintiff if it is not granted;
   (d) That the public interest will not be harmed if the relief is granted.
3. The practitioner should always check with the court to determine whether there are any special requirements for this type of action. In some instances, a separate motion for preliminary injunction or temporary restraining order is required.
4. An order should always be filed with the court along with other pleadings. Such an order should include all of the information required by rule 65(d).
5. The court may require the plaintiff to post a security bond before issuing a preliminary injunction or temporary restraining order. The plaintiff should be prepared for this possibility. The amount of bond is completely within the discretion of the court.[59] In the case of an alien who is about to be deported, it is likely that the court will require a bond in the amount of the airfare to the place of deportation.[60]

Actions for Damages Against Individual Government Agencies

When an attorney is presented with a situation that appears to involve the violation of a client's constitutional rights by a federal agent, consideration should be given to a cause of action for damages against the individual agent. A federal common law tort was

56. Securities and Exch. Comm'n v. Capital Growth Co., 391 F. Supp. 593 (S.D.N.Y. 1974).

57. Fed. R. Civ. P. 65(b).

58. *See supra* notes 44-47 and accompanying text.

59. Stockslager v. Carroll Elec. Coop., 528 F.2d 949 (8th Cir. 1976) (relying on rule 65(c) of the Federal Rules of Civil Procedure).

60. Rule 65(c) relates the amount of the bond to the costs incurred by the party wrongfully enjoined. The only actual costs incurred by the Service for a wrongful injunction would likely be the costs of deportation of the alien.

created by the United States Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[61] The purpose of the remedy was to give restitution for the wrongs committed against an individual by government agents irrespective of the individual's illegal actions. Often referred to as the "Bivens tort," this cause of action is premised on unlawful conduct of a federal officer which violates an individual's rights under the Constitution.[62] Although the tort has rarely been claimed in immigration cases,[63] it is a viable cause of action against an agent of the Service who has acted in violation of the constitutional rights of a citizen or an alien.[64]

Bivens involved a claim for damages for a violation of plaintiff's fourth amendment right to be free of illegal searches and seizures. Six narcotics agents had made a warrantless search of plaintiff's apartment and arrested him without probable cause.[65] An action was brought against the agents, claiming $15,000 for each of plaintiff's family members for the great humiliation, embarrassment and mental suffering caused by the agents' unlawful conduct. The lower courts dismissed the case on the ground that it failed to state a federal cause of action.[66] The Court held there *was* a cause of action, and that the agents were personally liable for damages because they violated plaintiff's rights guaranteed by the fourth amendment.[67]

In his concurring opinion, Justice Harlan wrestled with the issue of whether the Court could create a remedy where Congress had not done so. He noted, however, that injunctive relief would not cure the harm to an individual whose constitutional rights

61. 403 U.S. 388 (1971).

62. For more detailed discussions of *Bivens*, see Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977); Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979); Note, *"Damages or Nothing"—The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667 (1979); Note, *Bivens v. Six Unknown Named Agents: A New Direction in Federal Police Immunity*, 24 HASTINGS L.J. 987 (1973).

63. Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977), *modifying* 540 F.2d 1062 (7th Cir. 1976); *see infra* note 85.

64. The courts have long held that aliens within the United States must be accorded the same constitutional safeguards as citizens. *See* Sung v. McGrath, 339 U.S. 33, *modified*, 339 U.S. 908 (1950); Yamataya v. Fisher, 189 U.S. 86 (1903); Yick Wo v. Hopkins, 118 U.S. 56 (1886).

65. 403 U.S. at 389.

66. *Id.* at 390.

67. *Id.* at 397.

had been violated by a government agent.[68] Moreover, if the individual is absolved of any alleged crime "the 'exclusionary rule' is simply irrelevant."[69] He concluded that: "For people in Bivens' shoes, it is damages or nothing."[70] The Court believed it necessary to provide a remedy for the most flagrant police misconduct and concluded it was most important for the judicial branch to afford such a remedy if Congress failed to do so.

In *Butz v. Economou*,[71] the Court affirmed its position in *Bivens* and stated "the decision in *Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official."[72]

The creation and recent development of the Bivens tort is related to some extent to the decline in another court-created remedy, the exclusionary rule. Established by the Supreme Court, the exclusionary rule did not permit the use of illegally obtained evidence in criminal trials.[73] The intended purpose of the rule was to deter unreasonable searches and seizures in violation of the fourth amendment.[74] The rule has been severely criticized in recent years as being ineffective both in protecting individuals from the excesses of law enforcement agents and in protecting society from individuals who commit crimes.[75] The courts are tending to restrict the use of the exclusionary rule by applying it to fewer and fewer cases. Indeed, some courts have suggested that

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68. *Id.* at 410.
69. *Id.*
70. *Id.*
71. 438 U.S. 478 (1978).
72. *Id.* at 504; *see supra* note 19.
73. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).
74. United States v. Calandra, 414 U.S. 338 (1974).
75. *See, e.g.*, United States v. Ceccolini, 435 U.S. 268 (1978); Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974). In *Stone*, respondents sought federal habeas corpus review based on claimed violations of their fourth amendment rights. In its opinion, the Court denied application of the exclusionary rule to habeas corpus review and stated:

> Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

428 U.S. 465, 490-91 (1976) (footnotes omitted). A recent Fifth Circuit decision outlined a clear exception to the exclusionary rule. In United States v. Williams, 622 F.2d 830, 846 (5th Cir. 1980), the court held that where the mistaken or unauthor-

the better remedy where a violation of an individual's rights has resulted in law enforcement agents obtaining illegal evidence is for the court to admit the evidence at a criminal trial, and for the individual to bring a civil action for damages (a Bivens tort action) against the agents who acted unlawfully.[76]

In the context of immigration and naturalization law, the Board of Immigration Appeals has held that the exclusionary rule does not apply to deportation proceedings. In *Matter of Sandoval*,[77] the Board held that the application of the exclusionary rule to such proceedings would not offer any additional disincentives to misconduct by immigration officers. The Board also noted that a possible remedy in this type of situation was for the individual whose rights had been violated to bring an action against Service agents similar to the action brought in *Bivens*.[78]

Although the question of whether the exclusionary rule should be applied to deportation proceedings (or to any other immigration and naturalization case) has not been addressed by any court, it is not likely that the Board's position in *Sandoval* would be reversed. This is true because of the erosion of the exclusionary rule in recent years and because the courts have not been

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ized conduct was taken in a reasonable, good faith belief that it was proper, the exclusionary rule will not be applied to evidence.

In a recent Wyoming Supreme Court case, Justice Thomas stated in a concurring opinion:

> The social conditions which persuade me to conclude that the exclusionary rule no longer should be followed in all instances relate primarily to the pervasiveness of crime in the society of the 1980's. I do not believe that the courts of this land can ignore the encouragement which a blind adherence to the exclusionary rule must afford to the criminal component of our society. . . . Indeed I sometimes suspect that the exclusionary rule is no deterrent at all, but instead the law enforcement officers justify the loss of the case by pointing to judicial, rather than investigative, shortcomings.

Jessee v. Wyoming, 640 P.2d 56, 66 (Wyo. 1982).

76. Jessee v. Wyoming, 640 P.2d 56 (Wyo. 1982); People v. Lowe, 616 P.2d 118 (Colo. 1980) (interlocutory appeal of the trial court's suppression of certain improperly obtained evidence in a first degree murder case; concurring opinion of Justice Rovira criticized the exclusionary rule and called for legislative action allowing tort actions against law enforcement agents who obtain evidence illegally).

Where there is a possibility of pursuing actions against individual agents, the practitioner should be aware of the practical problems of presenting such a case when the plaintiff is an unsympathetic figure. For example, in *People v. Lowe*, it would undoubtedly be difficult to prevail in an action against the law enforcement agents where the plaintiff is an individual against whom there is extensive, albeit excludable, evidence that he had killed a young girl.

77. Matter of Sandoval, I.D. No. 2725 (1979).

78. *Id.* at 17.

willing to apply the rule to noncriminal proceedings of any type.[79] It is important, therefore, for the immigration and naturalization practitioner to consider an action for damages against individual Service agents when there has been an illegal search and seizure resulting in evidence which may be used at a deportation hearing. While such an action will obviously have little if any effect on the outcome of the deportation proceeding itself, it is hoped that it will remedy some of the damage inflicted on the individual plaintiff, and will also serve as a deterrent to future unlawful acts by the Service.

It should be noted that a recovery in a Bivens tort action has been allowed in cases involving a variety of constitutional violations. While *Bivens* itself involved a violation of the fourth amendment rights of the plaintiff, other cases have involved violations of first amendment,[80] fifth amendment,[81] and eighth amendment[82] rights. In each case the court found that the only adequate remedy for such a violation was damages against the government agent or agents who had acted unlawfully. The immigration and naturalization attorney should be aware of the actions of individual Service agents, and consider filing an action for damages where there has been a violation of a client's constitutional rights.

Procedure in an Action for Damages Against an Individual Agent

The complaint in a Bivens tort action should contain the following allegations:

1. Jurisdiction:
   (a) Allege that the cause of action arose out of the violation of plaintiff's constitutional rights by an agent of the United States government;
   (b) Allege that the court has jurisdiction under 28 U.S.C.

79. United States v. Janis, 428 U.S. 433 (1976).

80. Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975).

81. Davis v. Passman, 442 U.S. 228 (1979); Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928 (9th Cir. 1977); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972).

82. Carlson v. Green, 446 U.S. 14 (1980). In this case prison officials had failed to provide adequate medical treatment to an inmate who died as a result. The United States Supreme Court considered the Bivens tort claim even though another claim was available under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674 (1976). The Court found that the facts showed a violation of the cruel and unusual punishment provision of the eighth amendment, and reversed the lower court's holding that plaintiff was limited to recovery under the FTCA. The Court stated that an action for damages under *Bivens* was a more effective deterrent because: (a) punitive damages could be awarded; and (b) plaintiff had a right to a jury trial which was absent under the FTCA.

§ 1331 (federal question jurisdiction), which no longer requires that the amount in controversy exceed $10,000.[83]

2. Parties:
   (a) Individual federal officers must be named as parties in a proper Bivens action;[84]
   (b) All defendants named in the complaint must be served personally and individually.[85]
3. Allege the specific provisions of the Constitution that have been violated.
4. Make a short plain statement of the facts of the case, as required by rule 8(a) of the Federal Rules of Civil Procedure.[86] The statement should include a description of the unconstitutional conduct. The conduct should be related to specific defendants whenever possible.
5. Relief requested:
   (a) Damages, compensatory and exemplary, against individual agents;
   (b) Injunctive relief;
   (c) Attorneys' fees.
6. Jury trial:
   May be requested in a Bivens tort action.[87]

COLLECTING ATTORNEYS' FEES IN FEDERAL COURT ACTIONS

The collection of attorneys' fees in federal court actions against the federal government or any of its agencies is governed by section 2412 of title 28 of the United States Code.[88] Until recently, this statute specifically *excluded* "fees and expenses of attorneys . . ."[89] as recoverable against the federal government. The case law had generally held that "absent specific statutory authorization, section 2412 bars recovery of attorneys' fees against the United States. . . ."[90] Moreover, there was no exception even if

83. 28 U.S.C. § 1331 (Supp. IV 1980). *See supra* note 36 and accompanying text for venue requirements.

84. Chairez v. County of Van Buren, No. K 79-429 (W.D. Mich. Jun. 24, 1982). This landmark decision held that in some circumstances an alien may assert a private cause of action for damages under the Immigration and Nationality Act.

85. FED. R. CIV. P. 4(d).

86. *Id.* at 8(a).

87. Carlson v. Green, 446 U.S. 14, 22 (1980).

88. 28 U.S.C. § 2412 (Supp. IV 1980).

89. 28 U.S.C. § 2412 (1976), *amended by* Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2321, 2327 (1980).

90. Pealo v. Farmers Home Admin., 562 F.2d 744 (D.C. Cir. 1977); National

the government acted in "bad faith."[91]

Recent changes in section 2412, however, have now made it possible to seek attorneys' fees in a case against the federal government. In 1981, the following language was added to the statute:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.[92]

Although this new statute permits the recovery of attorneys' fees in any action pending on, or commenced on or after October 1, 1981, such recoveries are limited to those allowed under common law or a specific state statute.[93] The general rule in most states is that attorneys' fees can only be recovered where they are specifically authorized by contract or statute.[94]

Bad faith, malice, fraud, or wilful negligence are the exceptions to the general rule against the recovery of attorneys' fees in the absence of a contract or statute.[95] In such cases, the attorneys' fees will be awarded as part of an award of exemplary damages, which serve to punish the wrongdoer rather than to compensate the person seeking the damages.[96]

Council of Community Mental Health Centers, Inc. v. Mathews, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

91. Pearlstine v. United States Postal Service, 649 F.2d 194 (3d Cir. 1981); Donovan v. Nichols, 646 F.2d 190 (5th Cir. 1981).

92. 28 U.S.C. § 2412 (Supp. IV 1980).

93. In a conflict of laws situation, the question of the right to recover attorneys' fees is determined by the common law and the statutes in the state where the substantive rights of litigation accrued. Corrosion Rectifying Co. v. Freeport Sulphur Co., 197 F. Supp. 291 (S.D. Tex. 1961). In this diversity case, the issue was whether Texas or Louisiana law would govern regarding attorneys' fees in a suit brought under the Outer Continental Shelf Lands Act § 4(2), 43 U.S.C.A. § 1333(2) (current version at 43 U.S.C. § 1333(a)(2)(A) (Supp. IV 1980)). The court held that Louisiana law governed because that was where the substantive rights of litigation accrued.

94. *See* 25 C.J.S. *Damages* § 50 (1968 & Supp. 1982) and cases cited therein.

95. *Id.*

96. It is important to distinguish between special damages awarded to reimburse a petitioner and exemplary damages. Generally, attorneys' fees will not be allowed (in the absence of statute or contract) if it appears that their purpose is to put the petitioner back in his original position. It is necessary to show special circumstances in order to get an award of attorneys' fees. Beebe v. Pierce, 185 Colo. 34, 521 P.2d 1263 (1974).

An interesting discussion of the type of exemplary damages generally allowed by federal courts may be found in Wegner v. Rodeo Cowboy Assoc., 290 F. Supp. 369 (D. Colo. 1968), where the court allowed exemplary damages in a libel suit. The court held that exemplary damages are awarded for the purpose of punishing persons who have inflicted injuries with malice. The degree of malice, it was held,

In the context of immigration and naturalization law, there is obviously no statutory or contractual basis for the recovery of attorneys' fees under section 2412(b). However, section 2412(c)(2) takes the common law exception into account, and does provide a basis for recovery in immigration cases. The subsection states in part:

> (2) [I]f the basis for the award [of attorneys' fees] is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.[97]

If it can be shown that the Service acted in bad faith, or that its inaction amounted to bad faith, the plaintiff will have a basis for recovering attorneys' fees under the state common law exception for malice, fraud, or bad faith. Once this exception is established, attorneys' fees are recoverable under section 2412(b) and section 2412(c)(2).

The question, of course, is what constitutes "bad faith" under section 2412(c)(2). Since this provision was added so recently, it is impossible to predict how the courts will define "bad faith" vis-à-vis the Service. Some cases, however, have defined this term as it has been used in common law and in state statutes. For example, the Sixth Circuit has stated that the bad faith required to justify attorneys' fees "may be demonstrated by showing that a defendant's obstinancy [sic] in granting a plaintiff his clear legal rights necessitated resort to legal action with all the expense and delay entailed in litigation."[98]

In *Alderman v. Philadelphia Housing Authority*,[99] the court denied the recovery of attorneys' fees because the plaintiffs had failed to show that the defendants "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[100] Still another court defined "bad faith" as "not simply bad judgment or negligence, rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. It is different from the negative idea of negligence in that it contemplates a state of mind af-

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should determine the amount of the award, yet it must be fairly proportionate to the actual damages.

97. 28 U.S.C. § 2412 (Supp. IV 1980).

98. Huecker v. Milburn, 538 F.2d 1241, 1245 (6th Cir. 1976) (discussing Monroe v. Board of Comm'ers, 453 F.2d 259, 263 (6th Cir. 1972)).

99. 71 F.R.D. 187 (E.D. Pa. 1976).

100. *Id.* at 189 (quoting Alyeska Pipeline Service Co. v. Wilderness Soc., 421 U.S. 240, 258-59 (1975)).

firmatively operating with furtive design or ill will."[101]

Whether affirmative misconduct in the form of an unexplained delay in adjudicating a relative petition reaches the level of bad faith necessary to justify exemplary damages was neither addressed nor decided in *Miranda v. INS*.[102] However, where there is unreasonable delay by a government agent who knows that such delay will result in serious prejudice to an individual, the necessary degree of bad faith may be present. In *Houseton v. Nimmo*,[103] the court awarded attorneys' fees plus additional relief after a sixteen-month delay in a ruling on a Veterans' Administration relief case. The court specifically found that the unreasonable delay resulted in serious prejudice to the plaintiffs. A similar result might be had in an immigration case involving unreasonable delay.

There are several types of immigration cases in which the action or inaction of the Service probably rises to the level of bad faith, malice or wilful negligence necessary to qualify for exemplary damages under state law.[104] Certainly any action of the Service which qualifies as a Bivens tort should also allow a prayer for exemplary damages, including sufficient bad faith to allow recovery of attorneys' fees. For example, where there is an unreasonable warrantless search or an arrest without probable cause, there may be the necessary bad faith on the part of the Service and its agents to justify recovery of attorneys' fees. Moreover, where there has been extensive delay and inaction justifying an action for mandamus, the plaintiff should claim attorneys' fees.

In addition to the "bad faith" provision of section 2412(c)(2),

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101. Stath v. Williams, 367 N.E.2d 1120, 1124 (Ind. Ct. App. 1977). For additional definitions of the term "bad faith," see that term in 5 WORDS AND PHRASES, *Bad Faith* (1966 & Supp. 1982).

102. 673 F.2d 1105 (9th Cir. 1982).

103. 670 F.2d 1375 (9th Cir. 1982).

104. Malice has been defined in many different ways. Case law has been confusing and conflicting. Some courts have held that malice is "a wrongful act done intentionally and without just cause or excuse." Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381, 1385 n.4 (7th Cir. 1972) (citing Van Norman v. Peoria Journal-Star Inc., 31 Ill. App. 2d 314, 327, 175 N.E.2d 805, 810-11 (1961)). In Gray v. Earls, 298 Mo. 116, 122, 250 S.W. 567, 573 (1923), the court defined malice as "wantonness or reckless disregard of the rights of others." Another court held that malice implies an act done without legal justification or excuse. Post Publication Corp. v. Butler, 137 F. 723 (6th Cir. 1905). The practitioner should, of course, be cognizant of any definition of malice that has been used by the court in which he is seeking attorneys' fees under this particular exception to the common law rule.

In immigration cases, malice may need to be defined as an act of omission rather than commission. The wrongful act may be the failure to act, coupled with the officer's or agency's knowledge that the failure to act may injure another. Although the agency or officer may not have had a specific intention to hurt a particular individual, the failure to act knowing an injury would follow is sufficient. United States v. Reed, 86 F. 308, 312 (S.D.N.Y. 1897).

there is other new language which further expands the possibility for recovering attorneys' fees against the Service. Under section 2412(d)(1)(A), the court may award attorneys' fees to the prevailing party in an action against the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[105] In a recent unreported case in the United States District Court for the District of Colorado, the court awarded attorneys' fees to a plaintiff in an action against the Service. The court found that the Service's position in a deportation case refusing deferred action based on appealing humanitarian factors was unjustified.[106]

It can be expected that cases seeking attorneys' fees will be reaching the courts in ever-increasing numbers in the near future. The practitioner should be aware of section 2412, and of his ability to recover attorneys' fees where there has been bad faith by the Service.

Procedure for the Recovery of Attorneys' Fees

There is no separate procedure, as such, for seeking attorneys' fees in an immigration case. The practitioner should include the following allegations for the recovery of attorneys' fees in the principal pleadings in the case:

1. Facts sufficient to show bad faith, malice or wilful negligence;
2. Request for relief in the nature of exemplary damages to punish the Service or its agent, rather than to compensate the plaintiff;
3. Detailed documentation of the attorneys' fees being claimed;
4. Specific reference to 28 U.S.C. § 2412(b), (c)(2), and (d)(1)(A).[107]

CONCLUSION

There are many situations in which the immigration and naturalization attorney may wish to seek judicial relief. The most common of these will be a petition for review of a final deportation order or a writ of habeas corpus to review an exclusion order.

105. 28 U.S.C. § 2412 (Supp. IV 1980). This standard of "substantially justified" may be easier to establish than the previously discussed standard of "bad faith."

106. Velasco-Gutierrez v. Crossland, No. 80-Z-1367 (D. Colo. 1982) (order granting attorneys' fees), *appeal docketed*, No. 82-1682 (10th Cir. June 4, 1982).

107. 28 U.S.C. § 2412(b), (c)(2), (d)(1)(A) (Supp. IV 1980).

A declaratory judgment action in the district court will be the most appropriate route to challenge most other final decisions of the Service. There will be times, however, when it will be necessary to seek access to the courts for other reasons.

Where there has been a failure to act on the part of the Service or an unreasonable delay in adjudicating a petition or application, a writ of mandamus may be sought. This remedy will most likely compel the Service to act; unfortunately, it may not lead to the specific result desired by the applicant or petitioner. It will provide a decision, however, which may then be appealed if desired.

A mandamus action itself consumes time. Where it can be shown that some imminent action or inaction of the Service will cause immediate and irreparable harm, the appropriate remedy is the temporary restraining order or the preliminary injunction. These are extraordinary short-term measures, and should be sought only when an emergency situation exists, and even then in conjunction with some other action as well.

The time is ripe for an action in damages against the Service and its agents if an alien or citizen can show that an individual agent has violated his constitutional rights. This so-called Bivens tort action is a court-created remedy aimed at deterring the misconduct of law enforcement agents and at the same time curing the harm caused to individuals. In the immigration context, the Bivens tort would be appropriate where there had been an unreasonable warrantless search, an illegal arrest, or unconstitutional discrimination.

In any of the actions discussed in this article, it may be possible to seek an award of attorneys' fees. It should be remembered that courts do not generally favor such awards, and that the plaintiff has a heavy burden of proof. Bad faith, malice or wilful negligence on the part of the Service or any of its agents, however, creates a strong argument for an award of attorneys' fees.

All of the remedies discussed above are unusual in that they are not just appeals of decisions by the Service or the Board of Immigration Appeals. Since they are actions that are initiated by the attorney for the alien or citizen, rather than actions that respond to the Service, they must be undertaken with a great deal of care. It is especially important to consider the strategic advantages and disadvantages of these actions. Moreover, one should consider whether there are any other satisfactory alternatives to litigation. Once the decision is made to go forward with litigation, however, it is hoped that the discussion here will assist the practitioner in obtaining the relief desired for the client.